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HOUSE OF REPRESENTATIVES

REPORT
99-438

EXTENSION OF SBA SECTION 8 PILOT PROGRAMS

DECEMBER 12, 1985.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. MITCHELL, from the Committee on Small Business, submitted the following

REPORT

[To accompany H.R. 2787]

The Committee on Small Business, to whom was referred the bill (H.R. 2787) to extend through fiscal year 1988 SBA pilot programs under section 8 of the Small Business Act, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

THE PURPOSE OF THE BILL

The purpose of H.R. 2787 is to extend through September 1988 two pilot programs administrated by the Small Business Administration (SBA), the procurement pilot program and the surety bond waiver pilot program. These pilot programs are intended to promote the competitive viability of firms owned and controlled by socially and economically disadvantaged individuals who are participating in the Capital Ownership and Development Program conducted under authority of sections 7(j) and 8(a) of the Small Business Act.

INTRODUCTION AND BACKGROUND

On May 15, 1985, your Committee conducted an investigatory hearing on the 8(a) procurement pilot program and the surety bond waiver pilot program. The purpose of this hearing was to monitor the implementation of both programs to ensure that the statutory objectives were being fulfilled.

On June 18, 1985, the bill H.R. 2787 was introduced by Representative Joseph P. Addabbo and originally co-sponsored by Chairman Parren J. Mitchell.

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The bill was solely referred to your Committee and, subsequently, referred to its Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems.

The Subcommittee conducted legislative hearings on November 20, 1985 in Washington, D.C. Based upon testimony received at that hearing, the investigatory hearing held in May, and the review of other available materials, the Subcommittee conducted its mark-up on November 21, 1985. The Subcommittee favorably reported H.R. 2787 by a voice vote with a quorum being present.

The full Committee met on December 10, 1985 and by a vote of 38-1 ordered the measure favorably reported without amendment.

The Need for the Legislation

PROCUREMENT PILOT PROGRAM

Section 8(a) of the Small Business Act gives SBA the authority to enter into procurement contracts with Federal agencies and, then, to subcontract with socially and economically disadvantaged small business concerns for the actual performance of those contracts. Under the regular 8(a) program, a Federal agency either volunteers a requirement for use in the program or SBA may request a requirement from a particular buying agency. The head of the buying agency is empowered with the final authority to resolve any disagreement between SBA and the buying activity over the selection of a requirement for the program, or the terms and conditions of a potential 8(a) award.

Public Law 95-507, enacted in October 1978, established a two-year procurement pilot program for the purpose of increasing SBA's authority to capture a steady stream of quality contracts for award under the 8(a) program. The procurement pilot program grants SBA the unilateral authority to select, from an agency designated by the President, any contract requirement for use in the 8(a) program. Under this authority SBA may appeal to the head of the buying agency when there is some disagreement on the terms and conditions of the proposed contract. While the head of the agency has the exclusive authority to set such terms and conditions, the agency cannot override SBA's selection of the particular requirement.

The first pilot program began in 1979 with the Department of the Army as the designated pilot agency. However, full implementation of the program did not commence until February 1980.

H. Rpt. No. 98-2, February 3, 1983, submitted by your Committee concluded that the first pilot program was not fully effective primarily due to the constant disagreement between SBA and the Army about the type of contracts to be selected for inclusion in the pilot program. SBA was also criticized for its inability to properly match 8(a) firms' capabilities with procurement requirements. As a result of poor implementation, during the first pilot program (1979-1980), only nine contracts totaling $35 million were awarded.

In 1980 the pilot programs were extended for one year by P.L. 98-461 and the Army was again designated as the pilot agency. Implementation of the second pilot program resulted in the award of five contracts for a total of $60.7 million. Although the aggregate

dollar amount of the contracts awarded under the second pilot increased from 1980 levels, the number of contract actions actually decreased.

In 1983, the pilot programs were extended for a third time under Public Law 98-47. The Department of Transportation (DOT) was designated by the President as the pilot agency for this period which expired on September 30, 1985. Under this latest pilot program fourteen projects were identified by DOT for inclusion in the pilot program. This activity is as follows:

PARTICIPATION OF THE DEPARTMENT OF TRANSPORTATION IN THE SECTION 8(a) PROCUREMENT PILOT PROGRAM, AS OF NOV. 1, 1985

Requirement	Actual dollar award	Proposed but not yet awarded
Construction of medical care center, National Guard	$3,500,000	
Rehabilitation of 500-man barracks		$759,000
Construction of operating station		2,400,000
New operating station		1,700,000
Design, construct and maintain communication station control system		12,000,000
Design and manufacture of telescoping helicopter hangars	650,000	6,000,000
Computerized maintenance system development	267,080	2,300,000
Radio control equipment	14,500,000	55,000,00
Automated weather observing system	1,800,000	35,000,000
VHF direction finder systems	8,900,000	50,000,000
Airport remote monitoring systems	10,000,000	40,000,000
Tele-processing	440,000	300,000
Develop standards for hazardous materials packaging	750,000	
Soil nailing to stabilize highway cutslopes and excavations	247,331	
Totals	41,100,000	205,500,000

It should be noted that of the fourteen projects identified for the pilot program only nine definitized contracts have been awarded to 8(a) firms. One award has been made through a "letter" contract but the remaining four requirements have not yet been awarded. Your Committee is concerned that these four procurements, in particular, have been unnecessarily delayed because of bureaucratic confusion over the intent of the program and the manner in which it may be best implemented.

During the course of the procurement pilot programs SBA has held most of the substantive authority in the Central Office. For example, the SBA Central Office determined which requirements will be processed under the pilot program and would match those requirements with certain 8(a) firms that have passed some internal SBA screening that qualified them for participation in the pilot. The Central Office had the final authority with respect to contract identification and contract matching regardless of whether the requirement would otherwise be a "local buy" or a "national buy". However, under the regular 8(a) program the SBA district office is authorized to secure local buy requirements from any procuring activity within the district. All national buy requirements are, however, screened and matched with a contractor by the SBA Central Office. Your Committee believes that by reserving all pilot authorities in the Central Office the SBA has never effectively tested the validity of making the pilot authority permanent across

all agencies of the government. In order to evaluate the efficacy of this approach it appears axiomatic that the pilot concept needs to be merged with the regular 8(a) program and delegated to those field offices that have the day to day responsibility for running the program.

The procedures used by SBA to identify and match requirements under the pilot program should not be different from the procedures in effect under the regular 8(a) program. However, the most important element of the pilot program is the dispute resolution authority. It was through this mechanism Congress sought to test the premise that a more steady stream of quality contracts could be obtained for the program if disputes were resolved jointly by the SBA Administrator and the head of the buying agency rather than by the agency head unilaterally. Unfortunately, it is the opinion of your Committee that this concept has yet to be tested at the appropriate administrative level necessary to judge its validty.

SURETY BOND WAIVER PILOT PROGRAM

The surety bond waiver pilot program authorizes SBA to waive federal bonding requirements for 8(a) contractors who are start-ups and in the program for one year or less, provided that the following conditions are met:

(1) The firm cannot secure the requisite bond(s) needed for the job with or without an SBA guarantee;

(2) SBA will take such steps as may be appropriate to protect suppliers and laborers of the 8(a) firm; and

(3) SBA determines that the firm has the potential of becoming bondable if assisted for a limited time by the bond waiver.

The intent of this pilot is to assist 8(a) start-up firms that historically have had difficulties in obtaining bonding for contracts that they are otherwise capable of performing. Although the statute was enacted in October 1978, SBA did not publish implementing regulations for this program until December 1980.

Unfortunately, despite the explicit directive from the Congress, the concept of a bond waiver program has never been tested during the six years that SBA has had this authority. Testimony presented to your Committee during investigatory hearings on the surety bond waiver pilot program indicated that SBA has failed to both promote the program an to issue standard operating procedures needed to implement the program by its field offices. Moreover, the regulations that were adopted appear so overly restrictive that it is doubtful whether the program could have been implemented successfully under such constraints. For example, SBA regulations limit the application of the bond waiver program to contracts of $100,000 or less. This dollar threshold has not been changed or reviewed in five years even though the average dollar value of construction work required by Federal agencies has increased significantly. For example, in FY 1983 the average dollar value of an 8(a) construction project was $263,000. In FY 1984 this amount increased to $327,000 and in FY 1985 it was $347,000.

Your Committee is aware that bonding problems has substantially contributed to the inability of minority businesses to secure contracting opportunities with the Federal government. Accordingly,

your Committee believes that there is a demonstrated need for SBA to aggressively implement this program so that the utility of such a bond waiver concept may be fairly tested and evaluated.

What the Bill Would Do

PROCUREMENT PILOT PROGRAM

H.R. 2787 would extend the procurement pilot program until September 30, 1988. The bill would authorize the President to designate any executive agency to participate in the pilot program.

As previously stated, the purpose of the pilot program is to promote the development of firms in the 8(a) program by increasing the quality and the quantity of requirements flowing into the program. This was to be accomplished by expanding SBA's dispute resolution authority. As specifically stated in the report that accompanied the last pilot extension (H. Rpt. No. 98-2, February 3, 1983), these additional contracts may be of any kind and need not be limited solely to sophisticated, high technology, large dollar, or multiyear procurements. Both "traditional" and "non traditional" requirements may be selected for inclusion. Unfortunately, this was not the way the program was implemented under any of the past pilots. Although the SBA guidelines for the pilot program state that one purpose of the program is to secure additional procurement opportunities that will contribute to the growth and development of 8(a) firms, these opportunities are restricted only to those that are high technology, large dollar, multi-year, or sophisticated procurements that are not traditionally offered for the program. Because of this limitation many DOT modes stated in testimony before your Committee that their requirements did not meet the selection criteria for the pilot program and, consequently, they never participated.

It is the intent of your Committee to emphasize that contracts typically volunteered for the 8(a) program are suitable for the pilot program as well as non traditional procurements. The measure of program success must involve a comparative analysis of the pilot agency's participation in the 8(a) program before and after the pilot. Taking budget considerations into account, SBA should ascertain whether the number and type of the 8(a) contracts received from the pilot agency have increased and/or changed as a result of the pilot. Accordingly, it is imperative that the pilot authority be delegated to SBA field offices that run the 8(a) program on a daily basis to ascertain whether the pilot authority will have this effect if adopted on a national basis across all agencies.

SURETY BOND WAIVER PILOT PROGRAM

H.R. 2787 would extend the Surety Bond Waiver Pilot Program until September 30, 1988. As previously noted, despite the existence of bonding problems for section 8(a) firms, SBA has not made any effort to implement this program.

Your Committee certainly does not advocate waiving bonding requirements in every instance when an 8(a) firm is not bondable. SBA must exercise sound underwriting judgment in determining when to waive bonding requirements. On the other hand, we do not

agree that all firms unable to obtain bonds are, necessarily, likely to default and, therefore, should be denied a waiver.

One of the key criteria which surety companies use in deciding upon surety bond applications is the applicant's track record. They seek applicants with a history of having successfully performed the type and size of contract involved. Therefore, many startup firms are placed in a "catch 22" situation—they cannot obtain a surety bond because they have not done the type of work required in the past and they cannot begin to do that type of work because they cannot obtain a bond. It is imperative that SBA comply with the law so that your Committee may test the theory that a limited bond waiver for start-up 8(a) firms will improve their bondability because of the existence of a proven track record.

Your Committee recommends that SBA review the adequacy of the limitation on the dollar threshold of bonds that can be waived, as it relates to the average size of construction projects typically volunteered for the 8(a) program. Moreover, SBA is directed to disseminate notice of the availability of this program to the start-up construction firms in the 8(a) portfolio. The agency must move forward with the program and not, as in prior years, thwart the will of Congress. Any repetition of such recalcitrance is likely to cause your Committee to consider immediately the imposition of far more stringent limitations on SBA discretion for implementing these waivers.

Conclusion

The bill is a result of extensive analysis and review by your Committee. It is our conclusion that both pilot programs are needed to expand SBA's existing authority to develop socially and economically disadvantaged businesses into competitively viable entities. Your Committee believes that this bill, if forcefully implemented, presents an equitable, reasonable, and inexpensive means of achieving this objective.

Matters Required To Be Discussed Under House Rules

In compliance with clause 2(l)(2) of rule XI of the House of Representatives, the following statement is made relative to the vote on the motion to report H.R. 2787:

A majority of the Committee voted in person and was actually present and the motion was approved by a recorded vote of 38 ayes and 1 nay.

In compliance with clause 2(l)(3) of rule XI of the Rules of the House of Representatives, the following statements are made:

With regard to subdivision (A), relating to oversight findings, the Committee finds, in keeping with clause 2(b)(1) of rule X, that this legislation is in full compliance with the provision of this rule of the House which states:

> In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee.* * *

With regard to subdivision (B), relating to the statement required by section 208(a) of the Congressional Budget Act of 1974, the following statement is made relative to the legislation:

Section 3(a)(2) of the Congressional Budget Act defines the term "tax expenditures" as those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction, from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.

None of the provisions of H.R. 2787 deals with taxation and thus, in your Committee's opinion, this bill does not provide new or increased tax expenditures.

Section 3(a)(2) of the Congressional Budget Act defines the term "budget authority" as authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds.

Under this definition, it is the final action of Congress that authorizes an agency to enter into obligations which constitutes new budget authority. In those cases which entail (1) an authorization for an agency to undertake a program; (2) an authorization for appropriation of funds to permit that agency to enter into obligations; and (3) an actual appropriation of such funds, it would be only the final action of Congress in appropriating funds which constitutes the budget authority.

None of the provisions of H.R. 2787 appropriates funds and thus, in your Committee's opinion, the bill does not provide new budget authority. Accordingly, no comparison of budget authority, outlays or tax expenditures or 5-year projections have been made.

With regard to subdivisions (C) and (D), the cost estimate of the Director of the Congressional Budget Office relative to H.R. 2787 has been requested but not received.

No oversight findings or recommendations have been made by the Committee on Government Operations with respect to the subject matter contained in H.R. 2787.

In compliance with clause 2(l)(4), the Committee concludes that the provisions of this legislation in and of themselves will have no inflationary impact on prices and costs in the operation of the national economy.

In compliance with clause 7, rule XIII of the House of Representatives, the Committee makes the following statements:

The costs attributable to this bill for the current fiscal year and for fiscal years 1987–88 are as follows: Only administrative costs of continuing the pilot programs; no new or additional authorization or appropriation is being provided and it is fully expected that the administrative costs will be minimal and will be paid from the agencies overall budget.

No cost estimate was submitted by any Government agency on H.R. 2787 to your Committee.

In your Committee's opinion, the above statements fully comply with the Rules of the House of Representatives.

Section-by-Section Analysis

Section 1. Subsection (a) would amend subparagraph (B) of section 8(a)(1) of the Small Business Act by striking out "(other than

the Department of Defense or any component thereof)" thereby allowing the President to designate any civilian or military agency for participation in the procurement pilot program.

Subsection (b) provides that the designation of an agency made pursuant to subsection (a) shall be made no later than sixty days after the enactment date.

Section 2. Would amend the last sentence of section 8(a)(1) to provide that no contract shall be entered into under the procurement pilot program established by subparagraph (B) after September 30, 1988.

Section 3. Amends the last sentence of section 8(a)(2) to provide that the authority to waive bonds provided for in paragraph (2) may not be exercised after September 30, 1988.

Changes in Existing Law Made by the Bill, As Reported

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 2787, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Section 8 of the Small Business Act

Sec. 8. (a)(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate—

(A) * * *

(B) to enter into contracts with such agency [other than the Department of Defense or any component thereof)] as shall be designated by the President, to furnish articles, equipment, supplies, services, or materials, or to perform construction work for such agency. In any case in which the Administration certifies to any officer of such agency having procurement powers that the Administration is competent and responsible to perform any specific procurement contract to be let by any such officer, such officer shall let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. If the Administration and such procurement officer fail to agree on such terms and conditions, either the Administration or such officer shall promptly notify, in writing, the head of such agency. The head of such agency shall have five days (exclusive of Saturdays, Sundays, and legal holidays) to establish the terms and conditions upon which such procurement contract may be let to the Administration, and shall communicate in writing to the Administration the terms and conditions so established. Within five days (exclusive of Saturdays, Sundays, and legal holidays) after the receipt of such writen communication, the Administration shall decide whether to perform such procurement contract or withdraw its prior certifica-

tion that the Administration is competent and responsible to perform such contract: and

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[No contract may be entered into under subparagraph (B) prior to October 1, 1983 nor after September 30, 1985.]
No contract may be entered into under subparagraph (B) after September 30, 1988.

(2) Notwithstanding subsections (a) and (c) of the first section of the Act entitled "An Act requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work," approved August 24, 1935 (49 Stat. 793), no small business concern shall be required to provide any amount of any bond as a condition of receiving any subcontract under this subsection if the Administrator determines that such amount is inappropriate for such concern in performing such contract: *Provided*, That the Administrator shall exercise the authority granted by the paragraph only if—

(A) * * *.

* * * * * * *

[The authority to waive bonds provided in this paragraph (2) may not be exercised prior to October 1, 1983 nor after September 30, 1985.]
The authority to waive bonds provided in this paragraph (2) may not be exercised after September 30, 1988.

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